INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	14

CITATIONS

Cases:

Braverman v. *United States*, 317 U. S. 49 — 9

Colt v. *United States*, 190 Fed. 305, certiorari denied, 223 U. S. 729 — 11

Graham v. *United States*, 120 F. (2d) 543 — 11

Haggerty v. *United States*, 5 F. (2d) 224 — 11

Hoffman v. *United States*, 68 F. (2d) 101 — 13

Horn v. *United States*, 182 Fed. 721, certiorari denied, 219 U. S. 585 — 11

Martin v. *United States*, 100 F. (2d) 490, certiorari denied, 306 U. S. 649 — 11

Mills v. *United States*, 164 U. S. 644 — 11

Montoya v. *United States*, 262 Fed. 759 — 9

Smith v. *United States*, 157 Fed. 721, certiorari denied, 208 U. S. 618 — 9, 10

State v. *Jackson*, 79 Vt. 504, 65 Atl. 657 — 13

United States v. *Anderson*, 101 F. (2d) 325, certiorari denied, 307 U. S. 625 — 8, 9

***United States* v. *Ellis*, 43 F. Supp. 321** — 9, 10

United States v. *McCann*, 32 F. (2d) 540, certiorari denied, 280 U. S. 559 — 11

United States v. *Schenck*, 126 F. (2d) 702, certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705 — 11

Walker v. *United States*, 93 F. (2d) 383, certiorari denied, 303 U. S. 644, 668 — 9

Wallerstedt v. *Trank*, 146 Minn. 230, 178 N. W. 738 — 13

Statutes:

Section 19 of the Criminal Code, 18 U. S. C. 51 — 2, 9, 11

Section 37 of the Criminal Code, 18 U. S. C. 88 — 9

549498—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 196

WILLIE GRAY GARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 151–154) and dissenting (R. 154) opinions in the circuit court of appeals are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 28, 1943 (R. 154). Petitioner's two petitions for rehearing (R. 155–158, 159–166) were denied June 25, 1943 (R. 172). The petition for a writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, upon the trial of petitioner and another for conspiracy in violation of Section 19 of the Criminal Code, the trial judge in his instructions submitted the case to the jury on the erroneous theory that the issue for their determination was whether the defendants oppressed, threatened, or intimidated the victim of the alleged conspiracy.

STATUTE INVOLVED

Section 19 of the Criminal Code, 18 U. S. C. 51, provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

STATEMENT

Petitioner and one Earliest Walker were indicted on September 18, 1942, in the District Court

for the Northern District of Alabama in two counts, each charging a conspiracy in violation of Section 19 of the Criminal Code (R. 2–5). The first count alleged that on or about May 9, 1942, the defendants, together with other persons unknown to the grand jury, conspired to injure, oppress, intimidate, and threaten J. G. Dorough, a citizen of the United States, in the free exercise of his right and privilege to inform public officers of the United States of a violation of the laws of the United States, and that in pursuance of the conspiracy and to effect the object thereof the defendants, on or about May 9, 1942, threatened, cursed and otherwise ill-treated Dorough because he had informed investigators of the Alcohol Tax Unit as to the location of an illicit distillery and had reported to them the activities of various persons, including the defendants, allegedly connected with and engaged in the illicit liquor business in Sumter and Choctaw Counties, Alabama (R. 2–4). The second count alleged a conspiracy "at the time and place aforesaid" and was in similar terms, except that it averred that on or about May 11, 1942, in pursuance of the conspiracy and to effect the object thereof, the defendants assaulted Dorough by shooting at him and cursed, threatened, and otherwise ill-treated him because he had given information to investigators of the Alcohol Tax Unit, as alleged in the first count (R. 4–5).

The evidence adduced by the Government at the trial of the defendants before a jury showed as follows:

Petitioner and others were engaged in the manufacture of illicit liquor (R. 18–20, 21–22, 23–24, 65–67). On numerous occasions prior to May 1942 the defendant Walker had been seen in the company of petitioner in petitioner's truck and around his home, as well as in the woods (R. 66). Dorough informed Government agents of the location of an illicit distillery, of the activities of petitioner and others in connection with its operation, and of Walker's associations with petitioner (R. 21–22, 23–25, 65–66).

The agents raided the distillery and later arrested petitioner and three others on charges of operating it (R. 18–19, 78). About two weeks after the arrest, on May 9, 1942 (see R. 27–28), petitioner accosted Earl Brunson, who was employed by Dorough. Petitioner accused Brunson of obtaining information concerning petitioner's illegal activities from petitioner's employees and furnishing that information to Dorough, who in turn supplied it to the agents, and he threatened that if Brunson did not cease the practice and leave Dorough's employ and the community he would kill him. (R. 36–39, 54–57.)

In the evening of the same day Dorough drove Earl Brunson to the latter's home, where he lived with his parents. A few minutes after they

arrived there petitioner and Walker drove up in petitioner's truck. (R. 27–28, 46–47, 57, 59, 67.) Petitioner, carrying a flashlight and pistol, walked over to Dorough, shined the light in his face, placed the pistol under his chin, and told him that "he was meddling in his business and if he didn't stop it he would kill him" (R. 28–30, 47–51, 60–61, 67–71). Petitioner told Dorough "not to flip his lips any more, he would blow his eyes out" (R. 40), that "he was a good mind to blow his God Damn brains out" (R. 49), that "I am going to kill you" (R. 69), and that he was going to burn Dorough out because he had informed on him (R. 70). Petitioner and Walker then left the premises together (R. 33). Later that night, as petitioner and Walker were driving past the Brunson home, Brunson's mother hailed them and told petitioner that she did not think Earl had meddled in his business and that she did not want Earl to leave home. Walker was sitting in the truck holding a rifle; he stated that "Didn't nobody do it but Son" (Earl Brunson), and that "Son was toteing news to Mr. Dorough." Walker then got out of the truck with a pistol in his hand and left the premises on foot. (R. 31–33.) Early the next morning, May 10, Walker, accompanied by his brother and another man, obtained some money from his farmer employer and said that they were going to Birmingham (R. 103–104).

On the night of May 10 some unidentified person shot at Dorough five or six times with a pistol as he was getting out of his truck at his home (R. 71–72). On May 11 petitioner again returned to the Brunson home seeking Dorough (R. 52).

At the conclusion of all the evidence the defendants moved for a directed verdict; the motion was denied (R. 11). The jury found both petitioner and Walker guilty on count one, but they made no finding in respect of count two (R. 11). Petitioner's motion to set aside the verdict and for a new trial (R. 14–15) was denied (R. 11–12), and he was sentenced to imprisonment for five years and to pay a fine of $1,000 (R. 12–13).

On appeal the court below affirmed the conviction, one judge dissenting as to the sufficiency of the evidence to establish a conspiracy between the two defendants (R. 151–154). On June 16, 1943, petitioner filed a petition for rehearing (R. 155–158) and on June 18, 1943, a second petition for rehearing, together with a motion for new trial (R. 159–171).[1] On June 25, 1943, the court below entered its order denying "the petitions for rehearing" (R. 172).

---

[1] The second petition for rehearing and motion for a new trial apparently resulted from the fact that petitioner retained new counsel after the first petition was filed (see R. 158, 171).

ARGUMENT

Petitioner asserts, primarily as laying a foundation for his principal contention that the circuit court of appeals had jurisdiction to entertain his motion for a new trial and erred in not passing upon it, that an error of law pervaded the entire proceedings in the trial court and as a result he was convicted, not for conspiracy as alleged in the indictment, but for an act which was not an offense. His underlying premise is based upon a chain of reasoning which runs as follows: The indictment was drawn and the trial judge instructed the jury on the erroneous theory that an overt act is a "necessary element" of the offense of conspiracy denounced by Section 19 of the Criminal Code; the judge also erroneously instructed the jury that "The question for you to determine is, did these defendants or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant in the whiskey business" (R. 112), and thus authorized the jury to convict if they found that petitioner or Walker committed the "overt acts" charged in the indictment; and since each count charged the same conspiracy and "The jury convicted as to Count One, but acquitted as to Count Two" their verdict must, under the trial judge's instruction quoted above, be interpreted as an acquittal on the charge of conspiracy and a finding only that

the defendants oppressed, threatened, and intimidated Dorough as alleged in the first count, but not as alleged in the second (Pet. 1–2, 6, 7, 10, 13). Petitioner's conclusion is without justification.

Although, as petitioner points out, the two counts alleged the same conspiracy and differed only in the allegations of acts done "in pursuance of * * * [the] conspiracy, * * * and to effect the object thereof" (R. 3, 5), this, of course, was permissible. Cf. *United States* v. *Anderson*, 101 F. (2d) 325, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625. Moreover, the jury was told that only one conspiracy was involved. At the conclusion of the trial judge's charge, petitioner's counsel requested him to "let the Jury understand that both counts are based on an alleged conspiracy." The judge said that this was so, but that "they are separate constructions," and added: "Of course, Gentlemen, they are both based on a conspiracy as I said in the beginning of my charge. Count one charges conspiracy and count two charges it. In other words, the only difference between those counts is the difference in the date. They are on different dates as to the time of the alleged overt acts that were supposed to have been committed." Counsel agreed to this as a correct construction of the two counts. (R. 117–118.) In view of this instruction and the fact that petitioner was convicted and sentenced on only the first count (R.

12–13), he is in no position to assert that he was tried on an erroneous theory of a single conspiracy constituting a plurality of offenses according to the number of its objects. Compare *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *Anderson, supra.*

Nor is it material that the indictment charged (R. 3–4, 5), and the trial judge's instructions required the jury to find (in addition to the existence of the alleged conspiracy) (R. 114–115), that overt acts were committed to effect the object of the conspiracy. The offense under Section 19 of the Criminal Code is the conspiracy; it is only necessary to allege and prove that two or more persons conspired to injure, intimidate, threaten, or oppress a citizen of the United States in the free exercise or enjoyment of a right or privilege secured to him by the Constitution or laws of the United States. *Walker* v. *United States*, 93 F. (2d) 383, 387 (C. C. A. 8), certiorari denied, 303 U. S. 644, 668; *Montoya* v. *United States*, 262 Fed. 759, 760 (C. C. A. 8). Allegation and proof of an overt act in furtherance of such a conspiracy are wholly unnecessary (*Smith* v. *United States*, 157 Fed. 721, 725 (C. C. A. 8), certiorari denied, 208 U. S. 618), and to this extent Section 19 differs from Section 37 of the Criminal Code (18 U. S. C. 88), which interdicts conspiracies to commit offenses against the United States or to defraud it, but requires an overt act. *United States* v.

Ellis, 43 F. Supp. 321, 325 (W. D. S. C.). However, if an overt act is alleged in an indictment laid under Section 19, it may be considered as merely describing or particularizing the conspiracy charged. *Smith* v. *United States, supra; United States* v. *Ellis, supra.*

We may grant that the trial judge misstated the applicable law in instructing the jury that before they could convict they must find not only that a conspiracy existed, but also that the defendants, or one of them, "did an overt act to effect the agreement or carry it out" (R. 114–115). But this instruction required the Government to prove and the jury to find more than Section 19 requires. Petitioner was, consequently, favored by it.

In the final analysis, therefore, petitioner's basic contention rests solely upon the single statement in the judge's instructions to the effect that the question for the jury was whether the defendants had oppressed, threatened, or intimidated Dorough because he had reported their illegal activities (R. 112). This statement, considered out of its context, indicates that the jury was permitted to convict if they found only that the defendants, or either of them, committed any of the acts mentioned. But a reading of the charge as a whole [2] readily shows that the issue of the de-

[2] It is settled, of course, that the trial court's charge to the jury must be considered in its entirety and if, when so con-

fendants' guilt or innocence of the conspiracy charged was properly submitted to the jury. Thus, at the outset of his charge the judge explained that the offense denounced by Section 19 of the Criminal Code is conspiracy to injure, oppress, threaten, or intimidate a citizen in the exercise of his rights or privileges under the Constitution or laws of the United States, and he added that "It is also unlawful" to injure or oppress a citizen "who has exercised" such rights or privileges (R. 112).[3] This was followed by the statement of which petitioner complains. Shortly thereafter, however, the judge explained that the two counts of the indictment each charged a conspiracy (R. 112–

---

sidered, it is not subject to misconstruction, isolated erroneous statements furnish no basis for a claim of reversible error. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Haggerty* v. *United States*, 5 F. (2d) 224, 226 (C. C. A. 7); *Colt* v. *United States*, 190 Fed. 305, 308 (C. C. A. 8), certiorari denied, 223 U. S. 729; *Horn* v. *United States*, 182 Fed. 721, 740 (C. C. A. 8), certiorari denied, 219 U. S. 585; see also *United States* v. *Schenck*, 126 F. (2d) 702, 708 (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; cf. *Mills* v. *United States*, 164 U. S. 644.

[3] Petitioner says that by this latter instruction the jury were told that the object of the alleged conspiracy was itself an offense (Pet. 1–2). It is clear, however, that the judge was alluding to the portion of Section 19 which makes it an offense to conspire to injure or oppress a citizen because of his *having exercised* a right or privilege secured to him.

113). He then expounded to the jury the nature of a conspiracy and told them that they were to determine whether there was an unlawful agreement from the circumstances and facts in the case (R. 113). In later portions of his charge the judge twice explicitly instructed the jury that they were to determine two questions: first, whether the defendants entered into the unlawful agreement, and second, whether either of them committed an act to effectuate its purpose (R. 114–115).[4] Finally, at the specific request of petitioner's counsel, the judge reiterated that both counts were "based on a conspiracy" (R. 117-118). There were no other requests for instructions and no exceptions to the charge (see R. 118).

Although the particular language challenged by petitioner was erroneous, it can scarcely be said that the jury was misled into the belief that the sole issue was whether the defendants committed overt acts of oppression against Dorough. To the contrary, the charge as a whole made it clear to the jury that they could convict only if they found that the defendants entered into a conspiracy as charged in the indictment.[5]

---

[4] As we have shown (*supra*, pp. 9–10), this latter instruction, although not a correct statement of the applicable law, actually favored petitioner.

[5] Petitioner's ingenious argument that as a result of the challenged instruction the jury's verdict must be interpreted as a finding merely that the defendants committed the overt act alleged in the first count (see pp. 7–8, *supra*), is fallacious.

There is consequently no basis for petitioner's contention that because of an error of law pervading his trial he was not convicted for conspiracy, but for affirmative acts which do not constitute an offense under Section 19 of the Criminal Code or any other law of the United States. The circuit court of appeals, therefore, did not err in refusing to order a new trial on that ground, as urged in petitioner's motion for a new trial in that court (R. 166–169). Despite petitioner's assertion that the court declined to entertain his motion, it is clear that the court took

---

The jury did not acquit the defendants on the second count, as petitioner says (Pet. 2). Their verdict was silent as to that count (R. 11), and if we may speculate as to the reason for their failure to return a verdict on it, it may properly be explained on the ground that there was no positive proof as to the identity of the assailant who fired at Dorough on the night of May 10, 1942 (see p. 6, *supra*). The second count alleged that the defendants shot at Dorough on May 11, and although this discrepancy was not material, the jury was apparently not satisfied that the defendants, or either of them, did the shooting.

Petitioner also asserts, without supporting argument (Pet. 3–4), that the trial judge erroneously charged that the evidence showed that Dorough was a citizen of the United States (R. 112). Although Dorough did not testify directly that he was a citizen, he stated that he lived in Sumter County, Alabama (R. 62; see also R. 21). A person is presumed to be a citizen of the country in which he resides until the contrary is shown. *Hoffman* v. *United States*, 68 F. (2d) 101, 103 (C. C. A. 10); *Wallerstedt* v. *Trank*, 146 Minn. 230, 232, 178 N. W. 738 (1920); *State* v. *Jackson*, 79 Vt. 504, 509, 65 Atl. 657 (1907). Dorough's citizenship was not disputed and there was no objection to the judge's instruction in this regard.

cognizance of his contention that he was convicted on an erroneous theory of law, for the identical contention was presented to the court in his second petition for rehearing which accompanied the motion (R. 159–165), and the court specifically denied both of his petitions for rehearing (R. 172).[6]

CONCLUSION

The petition presents no question of importance, and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

SEPTEMBER 1943.

---

[6] Petitioner asserts (Pet. 3) that the evidence was insufficient to support the verdict and asks that this Court consider its sufficiency (Pet. 8), but he does not argue the point. The majority and dissenting judges in the court below reached opposite conclusions as to the sufficiency of the evidence to establish a conspiracy between the two defendants. This very fact plainly shows that the issue was peculiarly one for the jury. It would seem, therefore, that the jury's verdict should be deemed conclusive. In any event, the evidence adduced by the Government, which we have summarized in the Statement (*supra*, pp. 4–6), was, we submit, amply sufficient to make out a case for the jury.

U. S. GOVERNMENT PRINTING OFFICE: 1943